IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12363 of 2006
With
SPECIAL CIVIL APPLICATION No. 17182 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

GIRDHARPARK CO-OP. HOUSING SOCIETY LTD. - Petitioner(s)
Versus
SURAT MUNI. CORPORATION & 1 - Respondent(s)

==========

Appearance :
MR RS SANJANWALA for Petitioner(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 1 - 2.
MR PRASHANT G DESAI for Respondent(s) : 1 - 2.

==========

CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 27/11/2006

ORAL JUDGMENT

1. Draft amendment granted in Special Civil

Application No.12363 of 2006.

2. Rule. Mr.P.G.Desai, learned counsel for the Corporation waives notice of rule for the respondents. With the consent of the learned advocates appearing for both the sides, the matters are finally heard today. As the issue concerned in both the petitions is common, they are being considered by this common judgment.

3. The question which arises for consideration of this Court is as to whether the Corporation can take away or demand the possession of the land of the ownership of the society for laying down public street without following the procedure of acquisition either under Section 77 or under Section 78 of the Bombay Provincial Municipal Corporations Act, 1949 (hereinafter referred to as `the Act.').

4. The short facts for the consideration of the aforesaid point are as under :

The petitioners are societies having the land situated at the respective places at Surat. It is not in dispute that for the portion of the land belonging to the petitioners' societies, the Corporation has passed the resolution for laying down of the public streets and such resolution came to be passed as back as in the year 1999 and laying down of such public streets was pertaining to 114 public streets in city of Surat which included the

road/public street passing through the land of the societies of both the petitioners. The Corporation issued notices to the concerned petitioners societies for removal of the compound wall made on the boundary of the land of the petitioners so as to make it available for its utilization to the public as if the public street and such aspect is also not in dispute. When the Corporation intimated to both the petitioners for taking over of the possession of the land belonging to the society included in the public street including by removal of the construction of compound wall, the petitioners have approached to this Court by preferring the present petitions.

5. I have heard Mr.Sanjanwala, learned counsel appearing for the petitioners in both the petitions and Mr.P.G.Desai, learned counsel appearing for the respondent – Corporation and its officers.

6. Mr.Sanjanwala, learned counsel for the petitioners contended that even if a public street is laid down by the Corporation in purported exercise of powers under Section 205 of the Act read with Section 209 of the Act, it is required for the Corporation to follow the procedure of acquisition of the land either under Section 77 or Section 78 of the Act. Since such procedure is not followed, the Corporation cannot take possession of the land belonging to the petitioners – societies nor the compound wall over the said land constructed by the petitioners societies can be removed. He submitted that,

therefore, the action of the Corporation is without there being any authority under the law and without following mandatory procedure.

7. Mr.Desai, learned counsel appearing for the Corporation, by relying upon the affidavit-in-reply filed in the petitions, contended inter alia that the Corporation vide resolution dated 22.1.1999 authorized the Commissioner for laying down of the public street in exercise of the power under Section 205 of the Act. It has been further submitted that because of the traffic problem, the Corporation is constrained to exercise power under Section 205 of the Act in the interest of general public of the city of Surat and it is also submitted that though under the T.P.Scheme, the said road was not proposed but in view of the traffic problem in the said area, the Corporation is compelled to exercise the powers under Section 205 of the Act. Mr.Desai is unable to show this Court as to whether any procedure is followed for acquisition of the land by the Corporation either under Section 77 or Section 78 of the Act.

8. It is an admitted position that the Corporation has exercised the power for laying down of the new public street under Section 205 of the Act. It is true that as per Section 205 of the Act, there are enabling powers with the Corporation to lay out and make a new public street. Section 209 of the Act provides for the power to acquire premises for the improvement of the public streets which includes

the acquisition of the land required for opening, widening, extending, diverting or otherwise improving any public street, bridge or sub-way or of making any new public street, if any, standing upon such land. It also provides for the acquisition of the additional land and building. The word `premises' is defined as per Section 2(46) of the Act and the definition is inclusive and it also includes the land of any tenure whether open or enclosed. Therefore, on conjoint reading of Section 205 read with section 209 of the Act, it appears that for laying down of new public street by the Corporation, the procedure is required to be followed by the Commissioner subject to the provisions of Sections 77, 78 and 79 of the Act. Section 77 provides for acquisition of immovable property which would of course include the land but the manner of acquisition is by agreement on such terms and at such rates or prices not extending to maximum as approved by the Standing Committee of the Corporation. Section 78 of the Act provides for acquisition by following the provisions of Land Acquisition Act, 1894 in the event the Commissioner is unable to acquire the land by agreement as per Section 77 of the Act. Therefore, it is apparent that even if the Corporation is having enabling power under Section 205 of the Act for laying down of a new public street, it is required for the Corporation to acquire the land of the public street either by agreement as per Section 77 of the Act or in alternative by following the procedure through the State Government under the Land Acquisition Act as

per Section 78 of the Act. Until the procedure is followed either under Section 77 or Section 78 of the Act, the land cannot be said as as having vested to the Corporation for making it available as public street for its utilization of general public. It is only after the procedure is followed under Section 77 or Section 78 of the Act, as the case may be, the land would vest to the Corporation and, thereafter, the Corporation may make it available to the public at large being a new public street. In the present case, as no procedure under Section 77 or 78 of the Act is followed, the action of the Corporation calling upon the petitioners societies to surrender the land and/or remove the compound wall over the said land can be said as without following the mandatory procedure as required under the Act and, therefore, such action cannot be sustained in eye of law at this stage.

9. In view of the aforesaid observations and discussion, the answer to the question raised hereinabove would be in negative. If the facts of the present case are examined in light of the aforesaid observations, it cannot be said that the resolution of the Corporation which is passed as back as in the year 1999 for laying of a public street is illegal or without there being any authority. However, the communication of the Corporation calling upon the petitioners societies to remove the obstruction over the road/public street which is of a compound wall so as to make it available as public

street cannot be sustained in the eye of law until the proper procedure for acquisition is followed either under Section 77 or Section 78 of the Act, as the case may be. Hence, the action of the Corporation by the impugned communications dated 19.6.2006 calling upon the petitioners societies to remove the compound wall and to surrender the land for which the public street is laid, are quashed and set aside with the further observations that the Corporation shall be at liberty to take the possession of the land in question only after following the procedure of acquisition either under Section 77 or Section 78 of the Act, as the case may be.

10. The petitions are partly allowed. Rule is made absolute to the aforesaid extent. Considering the facts and circumstances of the case, there shall be no order as to costs.

(JAYANT PATEL, J)

srilatha